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SUPREME COURT, U.S.

(16)

NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON; ROB MCKENNA, ATTORNEY GENERAL; SAM REED, SECRETARY OF STATE,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS; WASHINGTON STATE GRANGE,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

ROBERT M. MCKENNA
Attorney General

James Kendrick Pharris
Deputy Solicitor General
Counsel of Record

1125 Washington Street SE
Olympia, WA 98504-0100
360-664-3027

Maureen Hart
Solicitor General

William Berggren Collins
Jeffrey Todd Even
Deputy Solicitors General

September 7, 2007

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REPLY BRIEF FOR THE PETITIONERS

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court invalidated the California blanket primary. This ruling was extended to Washington in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003). *Jones* isolated, as the crucial constitutional defect in the blanket primary, the fact that all primary voters were choosing each party's nominees. However, the Court stated that it would be constitutional to conduct a primary in which "[e]ach voter, regardless of party affiliation, [could] vote for any candidate, and the top two vote getters . . . move[d] on to the general election." *Jones*, 530 U.S. at 585. The Court stated that this primary was permissible because "[p]rimary voters are not choosing a party's nominee." *Id.* at 586. After a single experiment with an open primary, which limited voters to a single party, the citizens of Washington decisively passed Initiative 872—doing what this Court deemed permissible in *Jones*.

The political parties opposed Initiative 872 and now challenge the initiative on the grounds that it allows candidates to state a party preference on the ballot. The parties claim that that fact makes Initiative 872 a party nominating process, and that it unconstitutionally associates parties with candidates they dislike. The parties are wrong on both counts. Initiative 872 does not nominate party candidates, and the candidates are, by law, stating their preference, not a party affiliation. The parties may nominate their candidates as they choose, and those candidates may compete in the primary for a spot on the general election ballot.

1. The Top-Two Qualifying Primary Does Not Choose Political Parties' Nominees

a. The Political Parties Are Free To Choose Their Nominees As They Wish

The political parties contend that they are compelled to use the top-two qualifying primary to select their nominees. R. Br. 14; D. Br. 33. Their contention is

not supported in the law or the record. Initiative 872 does not govern how parties choose their candidates. Prior to Initiative 872, the law required the political parties to choose their nominees in the primary election. The law provided that candidates' names for a "partisan office for which a primary was conducted *shall not be printed on the ballot for that office at the subsequent general election unless the candidates receive . . . a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary.*" 2003 Wash. Sess. Laws page no. 775 (ch. 111, § 919) (emphasis added). Initiative 872 repealed this law. JA 420 (Initiative 872 § 17(4)). Under Initiative 872, any citizen qualified to hold office can file a declaration of candidacy and participate in the primary election. JA 414 (Initiative 872 § 9).

The Republican Party claims that: "State election officials admitted that under I-872, there is no 'partisan nomination process separate from the primary.' JA 104-11." R. Br. 18. The Democratic Party makes a similar argument. D. Br. 37. The parties are referring to letters written by local county election officials not the Washington Secretary of State who is responsible for adopting regulations implementing Initiative 872. Wash. Rev. Code § 29A.04.611. The parties also misstate the content of the letter. Each local county election official stated that at "this time, I am not aware of *any language associated with the Initiative* that contemplates a partisan nomination process separate from the primary." JA 105, 107, 109, 111 (emphasis added). This statement is accurate. Initiative 872 does not address how parties will nominate their standard-bearers. It repealed the state law requiring the parties to use the primary election.

Under Initiative 872, each "political party organization may adopt rules governing its own organization and the nonstatutory functions of that organization." JA 418 (Initiative 872 § 14). Thus, the political parties may select their nominees by whatever private means they choose, and provided that their

nominees file a declaration of candidacy, they will appear on the primary election ballot.

b. Initiative 872 Is Fundamentally Different From The Blanket Primary In *Jones* Because It Separates The Process Of Selecting Party Nominees From The Process Of Winnowing Candidates

The political parties claim that the top-two qualifying primary enacted by Initiative 872 is constitutionally indistinguishable from the blanket primary struck down in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). R. Br. 15; D. Br. 33. This claim is not well taken. In *Jones*, the Court held that permitting all voters to participate in the determination of each party's nominees violated the political parties' First Amendment right to freedom of association. *Jones*, 530 U.S. at 577.

The top-two qualifying primary is different from the blanket primary in *Jones* because it separates the process of selecting party candidates from the process of winnowing the candidates who will advance to the general election. By separating the nominating process from the winnowing process, Initiative 872 operates like the blanket primary upheld in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), which required "that a minor-party candidate *be nominated by convention, but imposed the additional requirement* that, *as a precondition to general* [election] *ballot access*, the nominee for an office appear on the primary election ballot and receive at least 1% of all votes cast for that particular office at the primary election." *Munro*, 479 U.S. at 191-92. Although any voter could vote for the Socialist Workers Party candidate in the primary, this did not violate the party's right of association because the voters were not selecting the Socialist Workers Party candidate—they were only deciding whether that candidate would advance to the general election.

The blanket primary upheld in *Munro* served as a winnowing process with respect to minor party candidates, who were *nominated* by private party processes. The top-two qualifying primary expands this principle to all candidates filing for office. Anyone can file a declaration of candidacy and participate in the top-two qualifying primary, if he or she is qualified to hold the office. JA 414 (Initiative 872 § 9). Access to the primary ballot is thus available to party nominees who file a declaration of candidacy, but access does not depend on being the nominee of a political party. The political parties select their standard-bearers by whatever process they choose. The top-two vote-getters advance to the general election. JA 412 (Initiative 872 § 6). By advancing the top-two vote-getters to the general election, Initiative 872 simply winnows the field of candidates who qualify for the general election ballot.

The difference between the top-two qualifying primary and the prior blanket primary is fundamental and material. By separating the nominating process from the winnowing process, the candidates of the major parties are no longer guaranteed a place on the general election ballot.[1]

The Republican Party recognizes that this change is material. According to the Republicans, if Initiative 872 had been in place in prior elections, some Republican candidates would not have advanced to the general

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[1] Relying on *Jones*, the Republican Party argues that the loss of the right to advance to the general election reduces its right to nominate candidates to a right to endorse. R. Br. 36-38. In *Jones* this Court rejected the argument that the burden imposed by the blanket primary was "minor because [the parties were] free to endorse and financially support the candidate of their choice in the primary." *Jones*, 530 U.S. at 580. However, in *Jones* the parties' nominee was determined in the primary. Under Initiative 872, the parties nominate their candidates using whatever procedure they choose. When a party supports its candidates in the primary election, it is not endorsing the candidates for the party nomination–it is supporting its nominees to advance to the general election.

election because the top-two vote-getters would have stated a preference for the Democratic Party. R. Br. 31.

The Republican Party acknowledges that the prior blanket primary, as it applied to minor parties, separated the nominating and winnowing process. R. Br. 35 n.14. The Republicans argue that *Munro* is distinguishable because, under the prior blanket primary, no other candidate on the ballot could run under the Socialist Workers Party standard. R. Br. 35. However, as explained below (*infra* pp. 5-11) the ability of a candidate to state his or her political party preference on the ballot does not mean that the candidate is competing for the party nomination in the primary.

c. Allowing A Candidate To State His Or Her Party Preference On The Ballot Does Not Make The Top-Two Qualifying Primary A Nominating Primary

Under Initiative 872, candidates may, if they choose, state a party preference on their declaration of candidacy. JA 415 (Initiative 872 § 9(3)). If a candidate states a party preference, it will be shown in conjunction with the candidate's name on the primary and general election ballots and in the state voters' pamphlet. JA 414, 417 (Initiative 872 §§ 4(3), 12). The party preference is provided for the information of the voters. JA 414 (Initiative 872 § 7 (3)). The Republican Party argues that the statement of party preference is no different from candidates seeking a party's nomination under the prior blanket primary. R. Br. 15-18, 44-45.

The Republicans' argument is based on its claim that party affiliation permeates Initiative 872. They essentially argue that the terms "preference" and "affiliation" are interchangeable, so that candidates who state a party preference are really seeking the party's nomination. This argument fails for at least two reasons. First, as explained above (*supra* pp. 3-5), Initiative 872 does not select party standard-bearers. The top-two vote-

getters advance to the general election without regard to party. The two successful candidates may both have the same party preference or no party preference. Second, the Republicans' argument fails because the terms "preference" and "affiliation" have distinct meanings, and Initiative 872 is precise in its use of these terms. The term "preference" means:

> "**2 a** : the act of preferring or the state of being preferred : choice or estimation above another : higher valuation or desirability . . . ." *Webster's Third New International Dictionary* 1787 (unabridged ed. 2002).

Preference means preferring or valuing one thing over another. Thus, a candidate who is an Independent may state a preference for the Republican Party in his or her declaration of candidacy because the candidate prefers the Republican Party over the Democratic Party—even though the candidate is a member of neither party. On the other hand, the term "affiliation" means:

> ": the act of affiliating : the state or relation of being affiliated" *Webster's Third New International Dictionary* 35 (unabridged ed. 2002).
>
> "**[1]af·fil·i·ate** . . . **1 a** : to attach as a member or branch : bring or receive into close connection . . . b : to join as a member : ASSOCIATE . . . ." *Webster's Third New International Dictionary* 35 (unabridged ed. 2002).

Thus, while a candidate with a preference prefers one party over another, a candidate with an affiliation is associated with or has joined the party.

Initiative 872 does not use these terms interchangeably as the Republican Party claims. For example, the term "affiliation" is only used twice in the Initiative in sections 3 and 5. Both sections provide that voters have the

> "right to cast a vote for any candidate for each office without any limitation based on the party

> preference or affiliation, of either the voter or the candidate." JA 411, 412 (Initiative 872 §§ 3(3); 5).

In these sections, the terms "preference" and "affiliation" are used with precision. In casting a ballot, voters are not limited by the party preference or party affiliation of the candidate or by the party preference or affiliation of the voter.

A candidate who states a party preference is not claiming to be a member of that party, nor is the candidate seeking the nomination of that party. The candidate is simply providing some information to voters. The parties are not entitled to simply assume, as the Republicans do, that voters will mistake a stated preference for an affiliation, or that voters will treat every candidate as seeking the nomination of the party for which the candidate has stated a preference.

The Democratic Party argues that, historically, printing a party name in conjunction with a candidate's name on the ballot indicated an association between the candidate and the party. D. Br. 33-35. A candidate who was not formally associated with a party could appear on the ballot, but not as a candidate of that party. According to the Democrats, the reason for this was that the "law gives [the voter] the right to assume that, if he wishes to vote for all the candidates of the Republican party, all he has to do is to make his check mark opposite the words "Republican Ticket," at the head of its group of candidates . . . ." D. Br. 33 (quoting *State ex rel. Bloomfield v. Weir*, 31 P. 419, 420 (Wash. 1892)).

This point is irrelevant. Voters have not had the option of voting for a "straight ticket" for over fifty years. 1947 Wash. Sess. Laws page no. 181 (ch. 77, § 1). Washington's primary and general election ballots are organized by office, not by party. Voters must vote separately for each office—there is no provision for straight ticket voting with a single mark by a party name. The fact that Washington once permitted straight ticket

voting does not prevent it from changing from a nominating primary to a winnowing primary.

The Democratic Party also argues that the plain meaning of the terms "nominate" and "primary" establish that Initiative 872 nominates party candidates. D. Br. 36. This argument also fails. First, Initiative 872 does not use the term "nominate" because it does not nominate party candidates. Second, the term "primary" or "primary election" is defined in the Initiative as "a procedure for winnowing candidates for public office to a final list of two as part of a special or general election." JA 412 (Initiative 872 § 5). By its terms, Initiative 872 does not nominate party candidates. Rather, it winnows all the candidates who seek an office to the top-two vote-getters, who will advance to the general election.

d. Other Election Laws Do Not Support The Claim That Initiative 872 Nominates Party Candidates

Both the Republican and Democratic Parties argue that other Washington laws relating to elections support their claim that Initiative 872 nominates party candidates. They point to laws governing filling vacancies in office (Wash. Const. art. II, § 15) and establishing major party status (Wash. Rev. Code § 29A.04.086), as well as campaign finance laws (Wash. Rev. Code §§ 42.17.020, .040, .510, 640). R. Br. 17-18; D. Br. 6-8, 33-35.

These laws do not support the claim that the top-two qualifying primary nominates party candidates. First, the parties' argument incorrectly assumes that a successful candidate who states a party preference will be treated as the party's nominee, even if he or she is not the party nominee. For example, when filling a vacancy in office, one of the requirements is that the new officer be of "the same political party as the legislator or partisan county elective officer whose office has been vacated . . . ." Wash. Const. art. II, § 15. The political parties assume that if the officer vacating the office expressed a preference for the Republican Party, but was not in fact

chosen by the Republican Party as its nominee, that the replacement must also be a Republican. From this assumption, they draw the conclusion that preference is the same as nomination. But this assumption is wrong. The policy of article II, section 15 is to honor the judgment of the voters in choosing an officer nominated by a particular political party. Thus, if a candidate won election as the Republican nominee, and later switched to the Democratic Party, the successor would have to be a Republican, not a Democrat. By the same token, under Initiative 872, if the Republican nominee loses the election, but another candidate who has stated a preference for the Republican Party wins, the successor need not be a Republican, because the Republican nominee did not win the election.

The parties also point to the procedure for qualifying as a major party. Wash. Rev. Code § 29A.04.086 provides that a major party is a "political party of which at least one *nominee* for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year." (Emphasis added.) Again, this statute applies only to the *nominee* of the party. If a candidate is elected who stated a preference for a party but is not the party nominee, his or her votes will not confer major party status.

Second, with regard to other laws, such as those governing campaign finance, the purpose of Initiative 872 was not to change the entire election system. The purpose was to separate the process of nominating party candidates from the process of winnowing the candidates who will advance to the general election. Because of the injunction entered against it in this litigation, the State has not had an opportunity to conduct an election under Initiative 872 and has had no need to examine and determine how its campaign finance laws would be administered in light of the Initiative. Speculation as to

how the State might implement or amend its laws to accommodate the top-two primary is not a basis to invalidate Initiative 872.

The Republican Party relies heavily on statements made by the Washington State Grange, the sponsor of Initiative 872, that the purpose of the measure was to have more moderate candidates and to continue the prior blanket primary. R. Br. 13-14, 47-48. The Democratic Party also refers to statements by the Grange. D. Br. 34. The parties argue that Initiative 872 is invalid because the Grange had an improper purpose—to propose an election system indistinguishable from the blanket primary.

Even if the political parties had accurately characterized the intent of the Grange, the statements made by the Grange could not overcome the plain text of the Initiative.[2] The Court "ascertain[s] the purpose of a statute by drawing logical conclusions from its text, structure, and operation." *Tuan Anh Nguyen v. I.N.S.* 533 U.S. 53, 68-69 (2001). Here, the text and structure of Initiative 872 establish that it is not a party-nominating primary. Given the clarity of Initiative 872, the Grange's campaign statements are not relevant. Relying on *Edwards v. Aguillard,* 482 U.S. 578 (1987), the Republican Party appears to argue that Initiative 872 is invalid because the Grange had an improper purpose when it sponsored the measure. R. Br. 47. However,

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[2] The parties are not accurate when they claim that the purpose of the Grange was to reenact the prior blanket primary. The Grange "specifically drafted Initiative 872 to conform to this ruling by the US Supreme Court [in *Jones*]." JA 79. The Grange stated that under "Initiative 872, the two candidates with the most votes in the primary win and go on to the general election ballot." JA 78. The Grange concluded that "[t]his system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Because the voters are not selecting party nominees, a qualifying primary does not interfere with any constitutionally-protected interest of a political party." JA 79.

Aguillard dealt with the "purpose prong of the *Lemon* test [which] asks whether [a] government's actual purpose is to endorse or disapprove of religion." *Aguillard*, 482 U.S. at 585. Under the *Lemon* test, the government's purpose in enacting a law is relevant to the law's constitutionality. However, this case does not involve a claim that the State has violated the Establishment Clause of the First Amendment. Establishment Clause case law has no application to the facts of this case, and the purpose of the Grange is irrelevant. *United States v. O'Brien*, 391 U.S. 367, 383 (1968), *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 205, 11 P.3d 762, 780 (2000).

2. In Enacting Initiative 872, Washington's Voters Permissibly Valued Broad Voter Choice Over Political Party Control Of The State's Primary

In the early days of the Republic there were no laws governing how the political parties selected their candidates. The direct primary was born as a tool to take the process of selecting candidates for public office out of the hands of the party elites and to place it into the hands of the general electorate. Pet. Br. 5-6. However, the political parties are slowly chipping away at the ability of the voters to select candidates for public office. For example, in this case, the Republican Party has also challenged the open primary that the State adopted after the blanket primary was invalidated and before Initiative 872 was enacted. Under the open primary law, any person who qualifies for an office may file a declaration of candidacy to participate in the Republican primary. JA 539 (Wash. Rev. Code § 29A.24.031, 2004 Wash. Sess. Laws page no. 1225 (ch. 271, § 158)). The Republican Party claims that this statute violates its right of association because Republican Party rules, limit who can participate in the Republican primary. JA 13 (Republican Complaint ¶ 37). For example, under Republican Party rules when "an incumbent seeking reelection obtains a vote of more than 66% at a nominating convention . . . the

incumbent shall be the only candidate certified [on the primary election ballot]." JA 90 (Republican Party Rule 5).[3] Thus, the Republicans claim a constitutional right to nominate only one candidate for every office, thus subverting the fundamental purpose of primary elections, turning back the clock on a century of reform designed to increase citizen participation.

Parties in other states are also attempting to limit citizen participation in the primary process. In *Mississippi State Democratic Party v. Barbour*, 491 F. Supp. 2d 641, 660 (N.D. Miss. 2007), the Democratic Party successfully argued that the state's closed primary violated its First Amendment right of association because the state did not have "mandatory party registration" or "mandatory voter identification[.]" In *Miller v. Brown*, 465 F. Supp. 2d 584, 595 (E.D. Va. 2006), the Republican Party successfully argued that the state's open primary violated its right of association.

Whether these claims by the political parties will ultimately succeed remains to be seen. However, it is clear that the political parties read this Court's decision in *Jones* to mean that they can require the state to impose significant restrictions on the state-run party-nominating primaries. The First Amendment does not require the citizens of a state to cede to the political parties the authority to select candidates for public office, and the parties do not have a First Amendment right to have the state provide primaries in which they select their standard-bearers.

Election law cases involve two distinct and fundamental rights. The first is "the right of individuals to associate for the advancement of political beliefs . . . ." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). The second is "the right of qualified

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[3] The district court did not resolve this claim because it was not properly raised in the stipulated statement of legal issues agreed to by the parties. Resolution of the claim is stayed pending the outcome of this case. JA 826-28.

voters, regardless of their political persuasion, to cast their votes effectively." *Id.* The Democratic Party apparently does not take issue with this principle, as it makes no mention of it. On the other hand, the Republican Party appears to believe that only political parties have First Amendment rights related to elections—and that the citizens of the State of Washington have none. Thus, it argues that the right of qualified voters to cast their votes effectively, regardless of party, calls into question the laws of other states that conduct closed and open primaries. R. Br. 42-43. In fact, in *Jones* and other cases, this Court has held that the voters' right to cast an effective ballot gives way to the political parties' right of association to choose their own nominee.

However, the state retains the power to remove all party organizational involvement from the formal primary election process so that "[c]andidates qualify for the primary ballot under a neutral signature requirement or other criterion, and the top two candidates who garner votes in the primary advance to the general election." Nathaniel Persily, *Toward A Functional Defense Of Political Party Autonomy*, 76 N.Y.U. L. Rev. 750, 812 (2001). Under this primary system, the parties are placed "outside the formal process of candidate selection, and the state will not hijack the parties' nomination processes." *Persily*, 76 N.Y.U. L. Rev. at 812. This system fully protects the parties' right to nominate their candidates, but the ability of the parties' candidates to automatically advance to the general election gives way to the peoples' right to cast an effective ballot.

In enacting Initiative 872, Washington's voters have chosen to value broad participation and choice in selecting those who will serve them in public office by separating the process of nominating party candidates from the process of winnowing the field of candidates who will advance to the general election. This fully protects the parties' First Amendment right of association, but it

also protects the peoples' right to freely select candidates for public office.

3. The Top-Two Qualifying Primary Does Not Infringe Upon The Political Parties' Associational Rights

a. The Political Parties' Right Of Association Does Not Include The Right To Prohibit A Candidate From Stating His Or Her Party Preference On The Ballot

The Republican Party claims that the presence on the ballot of a candidate who expresses a preference for the Republican Party violates the party's First Amendment right of association by creating a forced association between this candidate and the party and its chosen nominee. R. Br. 20-29, 39-41. The Democratic and Libertarian Parties make similar claims. D. Br. 35-36, 38-43; L. Br. 18-20. These claims should be rejected because allowing a candidate to state his or her party preference on the ballot neither creates an association between the candidate and the party of any sort that this Court has recognized, nor impermissibly interferes with the legitimate associational interests of the parties.

The Republicans rely on *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), to support their forced association claim. These cases are inapposite. In each, an organization claimed that the government interfered with its right of expressive association because the government either directly compelled speech by the organization or compelled the organization to accept as members persons whose very participation would transmit a message on behalf of the organization with which the organization disagreed. In *Pacific Gas*, the state required a "privately owned utility company to include in its billing envelopes speech of a third party

with which the utility disagree[d]." *Pacific Gas*, 475 U.S. at 4. In *Hurley*, the state required "private citizens who organize[d] a parade to include among the marchers a group imparting a message the organizers d[id] not wish to convey." *Hurley*, 515 U.S. at 559. In *Dale*, the state required the Boy Scouts to admit a homosexual to "adult membership" and the position of "assistant scoutmaster[.]" *Dale*, 530 U.S. at 644. The Court held that this forced inclusion would communicate the Boy Scouts' acceptance of homosexuality when, in fact, the organization did not accept it. By contrast, a candidate's statement of party preference on the ballot does not require the political parties to accept that candidate as a member or to make any kind of statement.

The Republican Party claims that the statement of party preference "forces the Republican Party to include messages and speakers in its 'parade' that may be contrary to the message the Party wants to send." R. Br. 39-40. The problem with this argument is that the election ballot is not the Republican Party's parade. It is the State of Washington's parade. In *Hurley*, the parade was sponsored by a private organization, and this Court held that participation by a Gay and Lesbian unit "would likely be perceived as having resulted from the [organization's] customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well." *Hurley*, 515 U.S. at 575. There is no reason to believe that the Court would have reached the same conclusion if the parade was sponsored by the government instead of a private organization. In that case, the message of the Gay and Lesbian unit could not be attributable to the private organization.

This case is analogous to *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). *Rumsfeld* concerned the Solomon Amendment, 10 U.S.C.A. § 983 (Supp. 2005), which provided that "if any part of an institution of higher education denies

military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds." *Rumsfeld*, 547 U.S. at 51. The Court rejected the claim that the presence of military recruiters on campus violated the institution's First Amendment right of association. According to the Court, the "compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. The Court also explained that "where the Boy Scouts' freedom of expressive association was violated when a state law required the organization to accept a homosexual scoutmaster, the statute here does not force a law school to accept members it does not desire. [Military recruiters] "are outsiders who come onto campus for the limited purpose of trying to hire students–not to become members of the school's expressive association." *Id.* at 49. As in *Rumsfeld*, Washington's ballot does not require the party to convey a message with which it disagrees, or to accept a candidate as a party member.[4]

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[4] The Republican Party argues that the state has no valid interest in placing information on the ballot that may influence how voters exercise their vote. Presumably, the party has no similar objection when party nominees are designated on the ballot. In any event, the cases upon which the party relies are not on point. The Republicans rely on *Anderson v. Martin*, 375 U.S. 399 (1964), and *Cook v. Gralike*, 531 U.S. 510 (2001). In *Anderson*, Louisiana required the candidate's race to appear on the ballot. The Court held that this requirement bore no relationship to qualification for office and that its compelled inclusion on the ballot constituted race discrimination prohibited by the Fourteenth Amendment. *Anderson*, 375 U.S. at 403-04. At issue in *Cook* was a required statement that candidates for Congress did not support term limits for United States Senators and Representatives. *Cook*, 531 U.S. at 514. The Court held that the requirement simply was not within the state's delegated power under the Elections Clause, United States Constitution Article 1, Section 4, Clause 1, to regulate the procedural mechanisms of elections for Senators and Representatives. *Cook*, 531 U.S. at 525-26. Initiative 872 is not similarly flawed. It does not promote invidious discrimination or, as in *Cook*, attempt to handicap candidates by

The Republicans also argue that the statement of party preference violates the Party's right to exclude unwanted persons from competing for the Party's nomination. The Republicans rely on decisions of the court of appeals that Republican and Democratic Parties could prevent David Duke and Lyndon LaRouche from competing for their nomination for President of the United States. *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992); *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996); *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998). These cases are authority only for the proposition that parties can exclude candidates from their convention or other nominating procedure. The cases do not support the claim that a candidate cannot state a party preference in a primary that does not nominate party candidates like Initiative 872.[5]

The parties are left to argue that the statement of party preference violates their First Amendment right of association because it will cause confusion among the voters. On its face, Initiative 872 makes it clear that a candidate's statement of party preference, if any, is just that, not a statement that the candidate is a member of a particular political party or the nominee of the party. The

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requiring them to include information on the ballot potentially harmful to their electoral prospects.

[5] The Republican Party argues that the statement of party preference is inconsistent with two decisions of the Washington Supreme Court; *State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 93, 229 P. 317 (1924), and *Most Worshipful Prince Hall Grand Lodge of Washington v. Most Worshipful Universal Grand Lodge, A.F. & A.M.*, 62 Wash. 2d 28, 44, 381 P.2d 130 (1963). These decisions have nothing to do with a statement of party preference on the ballot. Rather, they deal with naming new entities. *Hinkle* holds only that a new political party may not name itself after a person without his or her consent. *Hinkle*, 131 Wash. at 93. *Grand Lodge* holds only that "a group of persons [that] seeks to form an organization . . . cannot adopt the name of an already established order which has gained a highly esteemed reputation in the minds of the public." *Grand Lodge*, 62 Wash. 2d at 44. A candidate's statement of party preference has nothing to do with forming an organization using the names of the political parties.

political parties are not entitled simply to assume that there will be confusion under Initiative 872. Initiative 872 contemplated spending up to one million dollars to conduct a media campaign to inform voters about the new primary election. JA 401. The primary and general election ballots and voters pamphlet could also reiterate that the statement of preference is not a statement of association. The Secretary of State has already redesigned the declaration of candidacy to reflect that candidates are not seeking a party nomination and are only declaring a party preference—not a party association. JA 592-93. The Court should not invalidate the top-two qualifying primary on the assumption that voters will mistakenly believe that a statement of party preference means that the candidate is associated with a political party.[6]

b. The Political Parties' Right of Association Does Not Include A Right Of Access To The General Election Ballot

The Republicans argue that Initiative 872 imposes an unreasonably high threshold to advance to the general election. R. Br. at 30-32. According to the Republicans, their nominee would have to receive one-third of the vote in the primary election to be one of the top two vote-getters. This Court has recognized that the "freedom to associate as a political party, a right we have recognized as fundamental . . . has diminished practical value if the party can be kept off the ballot." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). However, Initiative 872 imposes virtually no restrictions on obtaining access to the primary ballot. A candidate must be qualified to hold the office and pay the filing fee or present signatures equal in number to the dollar amount of the filing fee. JA 414 (Initiative 872 § 9). This

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[6] It also is difficult to understand how a voter's mistaken understanding of a voting system, about which the voter has full opportunity to be accurately informed, could convert the system from a valid one to an invalid one.

right to compete in the primary election satisfies the party's right to ballot access. The primary is "not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates." *Storer v. Brown*, 415 U.S. 724, 735 (1974).

The Republicans' real complaint is not that they do not have access to the ballot, but that their nominees no longer automatically advance to the general election. Republican Party nominees do not have a First Amendment right to a place on the general election ballot. The Republican nominees have the same right and ability as any other candidate to persuade voters to advance him or her to the general election.

The cases the Republicans rely on for this argument concern minor party candidates who were not allowed to participate in the primary election. For that reason, they are inapposite. Under those circumstances, the only opportunity to go before the voters was in the general election, and the court therefore struck down laws that imposed too high a burden on ballot access. *Williams v. Rhodes*, 393 U.S. 23, 24 (1979), (striking down Ohio "election laws [that] made it virtually impossible for a new political party . . . or an old party . . . to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States."); *Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. at 187 (striking down Illinois election law "insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago" to appear on local election ballot). By contrast, Initiative 872 offers virtually wide-open access to the primary election ballot. Where that is the case, no candidate and no party nominee has a right to proceed to the general election ballot, unless he or she is advanced there by the voters.

4. Initiative 872 Is Not Subject To Strict Scrutiny And Advances Important State Interests

In our opening brief, we explained that Initiative 872 was not subject to strict scrutiny because it does not impose any substantial burden on the associational rights of the political parties. Pet. Br. 40-41. None of the parties respond to this argument. The Democrats simply assume that strict scrutiny applies because they argue that the State has not established a compelling state interest. D. Br. 21, 26-29. The Republicans and Libertarians do not discuss the applicable standard at all.

"[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). That is the case with Initiative 872. Unlike the blanket primary in *Jones*, Initiative 872 does not nominate party candidates. And the statement of party preference on the ballot neither compels speech by the parties, nor compels the parties to accept as members, candidates with whose messages they disagree. If Initiative 872 imposes a burden on the parties, it is minimal and furthers the State's interest in an informed electorate and in broad voter participation and choice in the State's primary election system. Pet. Br. 47-49.

5. Conclusion

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted.

ROBERT M. MCKENNA
Attorney General

James Kendrick Pharris
Deputy Solicitor General
Counsel of Record

1125 Washington Street SE
Olympia, WA 98504-0100
360-664-3027

Maureen Hart
Solicitor General

William Berggren Collins
Jeffrey Todd Even
Deputy Solicitors General

September 7, 2007